

## The sodomy offence: England's least lovely criminal law export?<sup>1</sup>

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### 1. The past

It all goes back to the Bible. At least it was in the Old Testament *Book of Leviticus*, amongst 'divers laws and ordinances', that a proscription on sexual activity involving members of the same sex first appeared:<sup>3</sup>

If a man ... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you.

The prohibition appears amongst a number dealing with sexual irregularities in ancient Israel. Thus, committing adultery with another man's wife [strangely, not with a husband or a bachelor] attracted the penalty of death. A man who lies with his daughter-in-law shall be put to death with his victim, seemingly however innocent she might be.<sup>4</sup> The penalty is stepped up for a man who takes a wife and her mother. They, inferentially all of them, are to be 'burnt with fire' so that 'there be no wickedness among you'.<sup>5</sup> A man that lies with a beast is to be put to death, as is the poor animal.<sup>6</sup> There is also a specific offence of a woman connecting with a beast.<sup>7</sup> The punishment and the offences portray an

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3 *Leviticus*, 20, 13.

4 *Ibid.* 20, 12.

5 *Ibid.* 20, 14.

6 *Ibid.* 20, 15.

7 *Ibid.* 20, 16.

early, primitive, patriarchal society where the powerful force of sexuality was perceived as a danger and potentially an unclean threat that needed to be held in the closest check.

According to those who have studied these things,<sup>8</sup> the early history of England incorporated into its common law an offence of 'sodomy' in the context of the provision of protection against those who endangered the Christian principles on which the kingdom was founded. In medieval times, the notion of a separation between the Church and the state had not yet developed. The Church had its own courts to try and punish ecclesiastical offences, being those that were perceived as endangering social purity, defiling the kingdom and disturbing the racial or religious order of things (Human Rights Watch 2008, p. 13).

A survey of the English laws produced in Latin in 1290, during the reign of Edward I,<sup>9</sup> mentions sodomy, so described because the crime was attributed to the men of Sodom who thereby attracted the wrath of the Lord and the destruction of their city.<sup>10</sup> In another description of the early English criminal laws, written a little later in Norman French, the punishment of burning alive was recorded for 'sorcerers, sorceresses, renegades, sodomists and heretics publicly convicted'.<sup>11</sup> Sodomy was perceived as an offence against God's will, which thereby attracted society's sternest punishments.

Initially, it seems, the offence was not limited to sexual acts between men. It could include any sexual conduct deemed irregular and extend to sexual intercourse with Turks and 'Saracens', as with Jews and Jewesses (Greenberg 1988, p. 274ff.). Although traceable to the Old Testament, and Jewish Rabbinical law, the offences were reinforced by a Christian instruction that associated the sexual act with shame and excused it only as it fulfilled a procreative function (cf. Brundidge 1993). Sodomy was a form of pollution. The history of the 11th and 12th centuries in England and in Europe included many instances of repression targeted at polluters, such as Jews, lepers, heretics, witches, prostitutes and sodomites (Moore 1987; see also Douglas 2002; Human Rights Watch 2008, pp. 13–14).

In the 16th century, following the severance by Henry VIII of the link between the English church and Rome, the common law crimes were revised so

8 An excellent review of the legal developments collected in this article appears in Human Rights Watch *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* (Human Rights Watch 2008), and D. Saunders, '377 – And the Unnatural Afterlife of British Colonialism' (Saunders 2008).

9 *Fleta, Seu Commentarius Juris Anglicani* was a survey of English law produced in the Court of Edward I in 1290 (ed. and trans. by H.G. Richardson and G.O. Sayles, London, Quaritch, 1955); see Human Rights Watch (2008, p. 13).

10 *Genesis*, 13, 11–12, 19, 5.

11 The work by Britton is described in H. Brunner, *The Sources of the Law of England* (Brunner 1888). See also H.L. Carson (1914, p. 664).

as to provide for the trial of previously ecclesiastical crimes in the secular courts. A statute of 1533 provided for the crime of sodomy, under the description of the 'detestable and abominable Vice of Buggery committed with mankind or beast'. The offence was punishable by death. Although this statute was repealed in the reign of Mary I (so as to restore the jurisdiction of the Church over such matters), it was re-enacted by Parliament in the reign of Elizabeth I in 1563 (Hyde 1970).<sup>12</sup> The statutory offence, so expressed, survived in England in substance until 1861. The last recorded execution for 'buggery' in England took place in 1836 (Hyde 1970, p. 142; see also Human Rights Watch pp. 13–14).

The great text writers of the English law, exceptionally, denounced sodomy and all its variations in the strongest language. Thus, Edward Coke declared:

Buggery is a detestable, and abominable sin, amongst Christians not to be named. ... [It is] committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast (Coke 1797, 3rd Part, cap. X *Of Buggery, or Sodomy*, p. 58).

When William Blackstone, between 1765–9, wrote his *Commentaries on the Laws of England*, he too included the 'abominable crime' amongst the precious legacy that English law bequeathed to its people. Because of the contemporaneous severance of the American colonies from allegiance to the British Crown in 1776, Blackstone's *Commentaries* were to have a profound influence on the development and expression of the criminal law in the American settlement and elsewhere (Prest 2009, p. 3). So in this way, by common law, statute law and scholarly taxonomies, the English law criminalising sodomy, and other variations of 'impure' sexual conduct was well-placed to undergo its export to the colonies of England as the British Empire burst forth on the world between the 17th and 20th centuries.

The result of this history was that virtually no jurisdiction which at some stage during that period was ruled by Britain escaped the pervasive influence of its criminal law and, specifically, of the anti-sodomy offence that was part of that law. The British Empire was, at first, highly successful as a model of firm governance and effective social control. At the heart of any such governance and control must be an ordered system of criminal and other public law. What better criminal law could the Imperial authorities at Westminster donate to their many new-found colonies, provinces and settlements beyond the seas, than to provide them with criminal laws which they observed and enforced at home?

The result of this historical development and coincidence is that the anti-sodomy laws, applicable in Britain at the time of Coke and Blackstone, came

12 The Buggery Act 1533, after its original repeal, was re-enacted as the Buggery Act 1563 during the reign of Elizabeth I.

swiftly to be imposed or adopted in the huge domain of the British Empire, extending to about a quarter of the land surface of the world, and about a third of its people. To this day, approximately 80 countries of the world impose criminal sanctions on sodomy and other same-sex activities, whether consensual or not or committed in private or not. Over half of these jurisdictions are, or were at one time, British colonies (Human Rights Watch 2008, p. 4; Ottoson 1998). The offence spread like an eradicable pestilence.

The 19th century in Europe witnessed a significant challenge to the inherited criminal laws of medieval times. In France, Napoleon's codifiers undertook a complete revision and re-expression of the criminal laws of royal France. This was an enterprise which Napoleon correctly predicted would long outlive his imperial battle honours. In the result, the sodomy offence, which had existed in France, was finally abolished in 1806 in a penal code that was profoundly influential and quickly spread to more countries even than Britain ruled. It did so through derivative codes adopted, following conquest or persuasion, in the Netherlands, Belgium, Spain, Portugal, Scandinavia, Germany, Russia, China, Japan and their respective colonies and dependencies. Although some of the latter occasionally, for local reasons, departed from the original French template<sup>13</sup> provided for sodomy offences, this was the exception. The consequence has been that virtually none of the countries of the European empires, other than the British, ever imposed criminal sanctions specifically on same-sex consensual activity in private. The existence of such offences has been a peculiar inheritance of British rule and of societies influenced by the Shariah law of Islam. That law, in its turn, traced its attitudes to religious understanding, in their turn, derived from the same Judeo-Christian scriptural texts as had informed the medieval laws of England.

Just as the Napoleonic codifiers brought change, and the removal of the religion-based prohibition on same-sex activities in France and its progeny, so in England a movement for codification of the law, including specifically the criminal law, gained momentum in the early 19th century. A great progenitor of this movement was Jeremy Bentham. He was the jurist and utilitarian philosopher who taught that the principle of utility, or the attainment of the greatest measure of happiness in society, was the sole justiciable object both of the legislator and the moralist (Hart 1984, p. 44). Bentham was highly critical of the antique morality that he saw evident in the writings of Blackstone. In his *A Fragment on Government* (1776) and *An Introduction to the Principles of Morals and Legislation* (1789), Bentham strongly criticised Blackstone for his

13 Thus French colonies such as Benin (previously Dahomey), Cameroon and Senegal adopted such laws, possibly under the influence of their British ruled neighbours. Germany, in Bismarck's time, adopted par.175 of the *Penal Code*. This survived the Third Reich, being eliminated by the German Democratic Republic in 1957 and by the Federal German Republic in 1969.

complacency about the content of the law of England as he presented. Bentham attacked Blackstone's antipathy to reform where such was so evidently needed.

Encouraged by contemporary moves for legal reform in France, Bentham urged a reconsideration of those forms of conduct which should, on utilitarian principles, be regarded as punishable offences under the law of England. He continued to urge the acceptance of the utilitarian conception of punishment as a necessary evil, justified only if it was likely to prevent, at the least cost in human suffering, greater evils arising from putative offences. Bentham eventually turned his reforming zeal to plans for improved school education for the middle class; a sceptical examination of established Christianity and reform of the Church of England; as well as economic matters and essays treating subjects as diverse as logic, the classification of universal grammar and birth control. Somewhat cautiously, he also turned his attention to the law's treatment of what later became named as homosexuality (Hart 1984, p. 45).

Bentham died in 1832, but not before influencing profoundly a number of disciples, including John Austin, who wrote his *Province of Jurisprudence Determined* (1832) and John Stuart Mill, who wrote his landmark text *On Liberty* (1859). Mill, like Bentham, urged the replacement of the outdated and chaotic arrangements of the common law by modern criminal codes, based on scientific principles aimed at achieving social progress in order to enable humanity, in Bentham's words, 'to rear the fabric of human felicity by the hands of reason and of law' (Hart 1984, p. 45; see also Anderson 1984, pp. 364–5).

The movement for reform and codification of the criminal law gathered pace in England as a result of the response of scholars and parliamentarians to the efforts of Bentham and his followers. In the result, the attempts in the United Kingdom to introduce a modernised, simplified and codified penal law for Britain came to nothing. The forces of resistance to Bentham's ideas (which he had described as 'Judge and Co', i.e. the Bench and Bar) proved too powerful. He had targeted his great powers of invective against the legal profession, charging it with operating for its own profit and at great cost to the public an unnecessarily complex and chaotic legal system in which it was often impossible for litigants to discover in advance their legal rights. The legal profession had their revenge by engineering the defeat of the moves for statutory reforms of the criminal law, although reform of the law of evidence was enacted after 1827.

What could not be enacted in England, however, became an idea and a model that could much more readily be exported to the British colonies, provinces and settlements overseas. There were five principal models which the Colonial Office successively provided, according to the changing attitudes and preference that prevailed in the last decades of the 19th century, when the British Empire was at the height of its expansion and power. In chronological order, these were:

1. The Elphinstone Code of 1827 for the presidency of Bombay in India (Hart 1984)
2. The Indian Penal Code of 1860 (which came into force in January 1862), known as the Macaulay Code, after Thomas Babbington Macaulay (1800–59), its principal author (Hooker, 1984, p. 330)
3. The Fitzjames Stephen Code based on the work of Sir James Fitzjames Stephen (1829–94), including his *A General View of the Criminal Law* (1863) and *Digest of the Criminal Law* (1877) (Uglo 1984, p. 486)
4. The Griffith Code named after Sir Samuel Hawker Griffith (1845–1920), first Chief Justice of the High Court of Australia and earlier Premier and Chief Justice of Queensland, who had drafted his criminal code, adopted in Queensland in 1901, drawing on the Italian Penal Code and the Penal Code of New York (Castles 1984, p. 217)
5. The Wright Penal Code. This was based on a draft which was prepared for Jamaica by the liberal British jurist R.S. Wright, who had been heavily influenced by the ideals of John Stuart Mill. Wright's draft code was never enacted in Jamaica. However, curiously, in the ways of that time, it became the basis for the criminal law of the Gold Coast which, on independence in 1957, was renamed Ghana (Freeland 1981, p. 307).

Although there were variations in the concepts, elements and punishments for the respective same-sex offences in the several colonies, provinces and settlements of the British Empire, a common theme existed. Same-sex activity was morally unacceptable to the British rulers and their society. According to the several codified provisions on offer, laws to criminalise and punish such activity were a uniform feature of British imperial rule. The local populations were not consulted in respect of the imposition of such laws. In some instances (as in the settler colonies), no doubt at the time, the settlers, if they ever thought about it, would have shared many of the prejudices and attitudes of their rulers. But in many of the territories in Asia, Africa and elsewhere where the laws were imposed and enforced, there was no (or no clear) pre-existing culture or tradition that required the punishment of such offences. They were simply imposed to stamp out the 'vice' and 'viciousness' amongst native peoples which the British rulers found, or assumed, was intolerable to a properly governed society.

The most copied of the above templates was the Indian Penal Code (IPC) of Macaulay. The relevant provision appeared in Ch.XVI, titled 'Of Offences Affecting the Human Body'. Within this chapter, section 377 appeared, categorised under the sub-chapter titled 'Of Unnatural Offences'. The provision read:

377. Unnatural Offences — Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be

punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.

Explanation — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. (*Naz Foundation vs. Govt. of NCT of Delhi and Others* 2009, p. 847 [3])

This provision of the IPC was copied in a large number of British territories from Zambia to Malaysia, and from Singapore to Fiji. The postulate inherent in the provision, so defined, was that carnal activities against the order of nature violated human integrity and polluted society so that, even if the 'victim' claimed that he had consented to it, and was of full age, the act was still punishable because more than the individual's will or body was at stake. The result of the provision was that factors of consent, or of the age of the participants or of the privacy of the happening, were immaterial. Legally, same-sex activities were linked and equated to the conduct of violent sexual criminal offences. Consensual erotic conduct was assimilated to the seriousness of prohibited acts of paedophilia.

The Griffith Penal Code for Queensland (QPC) was not only the basis for the provisions of the criminal codes in those jurisdictions of Australia which opted for a code (Western Australia, Tasmania and eventually the Northern Territory). It was also widely copied outside Australia, not only in the neighbouring territory of Papua New Guinea (where effectively it is still in force) but in many jurisdictions of Africa, including present-day Nigeria, Kenya, Uganda and Tanzania. The QPC introduced into the IPC's template a particular notion stigmatising the category of 'passive' sexual partners who 'permit' themselves to be penetrated by another male. Thus, s208 of the QPC provided:

Any person who –

- (a) Has carnal knowledge of any person against the order of nature; or
- (b) Has carnal knowledge of an animal; or
- (c) Permits a male person to have carnal knowledge of him or her against the order of nature

Is guilty of a felony and is liable to imprisonment for 14 years.

(Human Rights Watch 2008, p. 22),

This version of the offence ('person') not only extended it to women participants, but cleared up an ambiguity of the provision in the IPC. It made it clear that both partners to the act were criminals. It also widened the ambit beyond 'penetration' by introducing an independent provision for 'attempts to commit unnatural offences' (QPC ss.6, 29; see Human Rights Watch 2008, p. 23).

In some jurisdictions of the British Empire, when the anomalies of the legislation were pointed out, provisions were made (as in Nigeria and Singapore)

to exempt sexual acts between 'a husband and wife' or (as in Sri Lanka) to make it clear that the unspecified offences of carnal acts against the 'order of nature' extended to sexual activities between women.

I can recall clearly the day in my first year of instruction at the Law School of the University of Sydney when I was introduced to this branch of the law of New South Wales. That State of Australia had resisted the persuasion of the codifiers. Like England, it had preferred to remain a common law jurisdiction, so far as the criminal law was concerned. That law was the common law of England, as modified by Imperial statutes extended to the colonies and by colonial and later state enactments. In the last year of the reign of Queen Victoria, the colonial parliament of New South Wales, just before federation, enacted the Crimes Act 1900 (NSW), still in force. Part III of that Act provided for the definition of 'Offences against the Person'. A division of those offences was described as 'Unnatural Offences'. The first of these provided, in section 79:

79. *Buggery and Bestiality*: Whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for 14 years.

This provision was followed by one, similar to the QPC, providing for attempts (s80) and another providing for indecent assaults (s81).

Three years before I came to my acquaintance with s79, the State Parliament had enacted new sections, probably in response to the ceaseless urgings of the State Police Commissioner (Colin Delaney) for whom homosexual offences represented a grave crisis for the moral fibre of Australian society. The new offence included additional punishment for those who, in a public place, solicited or incited a male person to commit any of the foregoing unnatural offences.

Possibly in response to concern about the unreliability of police evidence in such offences, the State Parliament added a provision (s81B[2]) requiring that a person should not be convicted of such an offence 'upon the testimony of one person only, unless such testimony is corroborated by some other material evidence implicating the accused in the commission of the offence'. By 1955, in Australia, the infection of hatred had not yet died. But new anxieties were beginning to surface.

As I listened to the law lecturer explaining peculiarities of the unnatural offences, including the fact that, in law, adulthood and consent were no defence and both parties were equally guilty (*R v. McDonald* 1878); the availability of propensity evidence and evidence of similar facts (*O'Leary v The King* 1947, p. 360);<sup>14</sup> and the heavy penalties imposed upon conviction (*Veslar v The Queen* 1955), I knew that these provisions were targeted directly and specifically at me. I could never thereafter share an unqualified belief that the

14 cf. (1942) 15 *Australian Law Journal* 131.



inherited criminal law of Australia was beyond criticism. With a growing body of opinion I concluded on the need for modernisation and reform.

## 2. The present

The criminal laws introduced into so many jurisdictions by the British Imperial authorities remained in force in virtually all of them long after the Union Jack was hauled down and the plumed Britannic viceroys departed, one by one, their Imperial domains.

Occasionally, the needs of a particular territory were reflected in modifications of the statutory provisions before the end of British rule. Thus, in the Anglo-Egyptian Sudan, the Sudanese Penal Code of 1899 contained an adaptation of the IPC. Uniquely among the British colonies, this introduced the requirement of consent for most versions of the offence, but removed the relevance of that consideration where one of the participants was a teacher, guardian, person entrusted with the care or education of the 'victim' and where he was below the age of 16 years. Likewise, in the Sudanese Code, the crime of 'gross indecency' was only punishable where it was non-consensual (Human Rights Watch 2008, p. 22). Inferentially, these variations on the IPC were introduced to reflect the colonial administrators' understanding of the then current sexual customs and practices in that relatively late addition to their area of responsibility. The distinctions in the colonial code survived in Sudan until 1991 when the government imposed an undifferentiated sodomy offence, justified by reference to the requirements of Shariah law. Similar moves are reported in other post-colonial Islamic societies, including northern Nigeria and Pakistan, described as involving a 'toxic mix' of the influence of the two international streams that explain most of current criminal prohibitions against consenting adult private same-sex conduct (the British and Islamic) (Human Rights Watch 2008, p. 22).

As the centenary of the formulation of the IPC approached in the middle of the 20th century, moves began to emerge for the repeal or modification of the same-sex criminal offences, commencing in England itself and gradually followed in all of the settler dominions and European jurisdictions.

The forces that gave rise to the movement for reform were many. They included the growing body of scientific research into the common features of human sexuality. This research was undertaken by several scholars, including Richard Krafft-Ebing (1840–1902) in Germany, Henry Havelock Ellis (1859–1939) in Britain, Sigmund Freud (1856–1939) in Austria and Alfred Kinsey (1894–1956) in the United States. The last, in particular, secured enormous public attention because of his unique sampling techniques and the widespread media coverage of his successive reports on variation in sexual conduct on the part of human males and females (Kinsey et al. 1948, 1953).

The emerging global media and the sensational nature of Kinsey's discoveries ensured that they would become known to informed people everywhere. Even if the sampling was only partly correct, it demonstrated powerfully that the assumption that same-sex erotic attraction and activity was confined to a tiny proportion of wilful anti-social people was false. Moreover, experimentation, including acts described in the criminal laws as sodomy and buggery, treated as amongst the gravest crimes, were relatively commonplace both amongst same-sex and different-sex participants. If such acts were so common, the questions posed more than a century earlier by Bentham and Mill were starkly re-presented. What social purpose was secured in exposing such conduct to the risk of criminal prosecution, particularly where the offences applied irrespective of consent, age and circumstance and the punishments were so severe?

A number of highly publicised cases in Britain, where the prosecution of title 'offenders' appeared harsh and unreasoning, set in train in that country widespread public debate and, eventually, the formation of committees throughout the United Kingdom to support parliamentary moves for reform. Eventually, a royal commission of enquiry was established, chaired by Sir John Wolfenden, a university vice-chancellor (Committee on Homosexual Offences and Prostitution 1957; Kirby 2008). The Commission's report recommended substantial modification and containment of homosexual offences, removing the ambit of the criminal law for consensual conduct. The Wolfenden Committee expressed its principle with near unanimity in terms that would have gladdened the heart of Jeremy Bentham:

Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business (Committee on Homosexual Offences and Prostitution 1957, pp. 187–8).

As a result of the report, important debates were initiated in Britain involving leading jurists (Devlin 1959; Hart, 1959).<sup>15</sup> Excuses were advanced by the government of the day for not proceeding with the reform, generally on the footing that British society was 'not yet ready' to accept the proposals (Grey 1992, p. 84). Ultimately, however, private members bills were introduced into the House of Commons and the House of Lords, by proponents of reform, neither of whom was homosexual.

Within a decade of the Wolfenden Report, the United Kingdom Parliament changed the law for England and Wales (Sexual Offences Act 1967). At first, the age of consent was fixed by the reformed law at 21 years and there were a number of exceptions (relating to the Armed Forces and multiple parties). The law did not at first apply to Scotland or Northern Ireland. Eventually, the age of consent was lowered to be equal to that applicable to sexual conduct involving

15 The Devlin/Hart debates are described in Lacey 2004, p. 243.

persons of the opposite sex. The other exceptions were repealed or confined. Reforming laws were then enacted for Scotland and Northern Ireland. The last mentioned reform was achieved only after a decision of the European Court of Human Rights held that the United Kingdom was in breach of its obligations under the European Convention on Human Rights by continuing to criminalise the adult private consenting sexual conduct of homosexuals in that Province (*Dudgeon v United Kingdom* 1981).

The engagement of the European Court (made up substantially of judges from countries long spared of such offences by the work of Napoleon's codifiers) spread eventually to the removal of the criminal offences from the penal laws of the Republic of Ireland (*Norris v Republic of Ireland* 1988) and Cyprus (*Modenos v Cyprus* 1993), to whom Britain had earlier made that gift. In consequence, the law of Malta was also reformed. Later cases (as well as the discipline of the Council of Europe upon Eastern European countries which had followed the Soviet imposition of such offences) led to repeal in each of the European nations aspiring to membership of the Council and of the European Union.

The influence of the legislative reforms in the country from which the Imperial criminal codes had been received resulted, within a remarkably short time, in the legislative modification of the same-sex prohibition in the penal laws of Canada, New Zealand (1986), Australia (1974), Hong Kong (1990) and Fiji (2005 by a High Court decision). Likewise, a decision of the Constitutional Court of South Africa in 1998 struck down the same-sex offences as incompatible with the post-Apartheid Constitution of that country *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998, 1999). In that decision, Ackermann J said:

The way in which we give expression to our sexuality is the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998, p. 32).

To the same end, the Supreme Court of the United States of America (another country which, with few exceptions, inherited its criminal law from the British template), eventually,<sup>16</sup> by majority, held that the offence enacted by the State of Texas, as expressed, was incompatible with the privacy requirements inherent in the United States Constitution (*Lawrence v Texas*, 2003). Kennedy J, writing for the Court, declared:

... [A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in

16 After a false start in *Bowers v Hardwick* (1986).

a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. ... When homosexual conduct is made criminal by the law of the state, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres. (*Lawrence v Texas* 2003, pp. 567, 575)

In Australia, the journey to reform was not always easy. It began with removal of the offences in the Crimes Act 1900 (NSW) which were then (1975) applied to the Australian Capital Territory, a federal responsibility. Reform of the law in South Australia followed (1976). One by one, the other States of Australia, by parliamentary action, amended their criminal laws to remove the 'unnatural offences'. Amongst the last to make the change were Western Australia (1989) and Queensland (1990). In each of those States, the distaste at feeling obliged to repeal the template of the QPC then applicable, was given voice in parliamentary preambles which expressed the legislature's discomfiture. Thus, in Western Australia, the preamble introduced in 1989, and finally settled in 1992, expressly stated:<sup>17</sup>

Whereas the Parliament disapproves of sexual relations between persons of the same sex; [and] of the promotion or encouragement of homosexual behaviour ...

And whereas the Parliament does not by its act in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitudes to homosexual behaviour ... [or of] urging [young persons] to adopt homosexuality as a life style ...

Still, the old defences were modified by the provision of a defence if the accused believed, on reasonable grounds, that a girl victim was over 16 years of age or a male over 21.<sup>18</sup>

In Queensland, where the legislators were called upon to repeal the provision continued in the original source of the Griffith Code, a preamble was also enacted only slightly less disapproving:<sup>19</sup>

Whereas Parliament neither condones nor condemns the behaviour which is the subject to this legislation ... [but] reaffirms its determination to enforce its laws prohibiting sexual interference with children and intellectually impaired persons and non-consenting adults.

For the first time, the Queensland law introduced a reference to the then growing significance of the dangers of HIV/AIDS by then a consideration in the Australian reform discourse:

17 Law Reform (Decriminalisation of Sodomy) Act 1989 (WA); Acts Amendment (Sexual Offences) Act 1992 (WA).

18 Criminal Code Act 1913 (WA), s186(2) (since repealed).

19 Criminal Code and Another. Act Amendment Act 1990 (Qld), Preamble.

And whereas rational public health policy is undermined by criminal laws that make those who are at high risk of infection unwilling to disclose that they are members of a high-risk group.

Only one Australian jurisdiction held out, in the end, against repeal and amendment, namely Tasmania. In that State, a variation of the QPC continued to apply.<sup>20</sup> Endeavours to rely on the dangers of HIV/AIDS to attain reform failed to gain traction. Eventually, immediately after Australia, through its federal government, subscribed to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), a communication was made by way of complaint to the Human Rights Committee in Geneva. This argued that, by criminalising private same-sex conduct between consenting adults, the law of Tasmania brought Australia in that jurisdiction, into breach of its obligation under the ICCPR.

In March 1994, the Human Rights Committee of the United Nations in *Toonen v Australia* (1994) upheld the complaint and found Australia in breach. The majority of the Committee did so, on the basis of a breach of Article 17 of the ICCPR (privacy). A minority report suggested that there were other breaches in relation to discrimination on the grounds of sex and of the requirement to treat persons with equality. Reliant upon the Human Rights Committee's determination, the Australian Federal Parliament enacted a law to override the Tasmanian same-sex prohibition, purported to act under the external affairs power in the Australian Constitution.<sup>21</sup> The validity of the law so enacted<sup>22</sup> was then challenged by Tasmania in the High Court of Australia. That court in *Croome v Tasmania* (1998, p. 119) dismissed an objection to the standing of one of the successful complainants to Geneva in seeking relief against the Tasmania challenge. With this decision, the Tasmanian Parliament surrendered. It repealed the anti-sodomy offence of that State. It was not therefore necessary for the High Court to pass on the constitutional validity of the federal law. In all Australian jurisdictions, the old British legacy had been removed by legislation and the democratic process. It had taken 20 years.

For a long time, no further significant moves were made in non-settler countries of the Commonwealth of Nations to follow the lead of the legislatures in the old dominions and the courts in South Africa and Fiji. On the contrary, when a challenge was brought to the Supreme Court of Zimbabwe in *Banana v The State* (2004), seeking to persuade that court to follow the privacy and equality reasoning of the South African Constitutional Court, the endeavour, by majority, failed.

Another setback was suffered in Singapore, which, like Hong Kong,

20 Criminal Code Act 1924 (Tas), s122.

21 Australian *Constitution*, s51 (xxix).

22 Human Rights (Sexual Conduct) Act 1994 (Cth), s4. The section relied on and recited Art.17 of the ICCPR.

was a small common law jurisdiction with a prosperous Chinese society unencumbered by cultural norms of Judeo-Christian origin, except as grafted onto them by their temporary British colonial rulers. In Hong Kong, the then territory's law reform commission supported the Wolfenden principles and favoured their introduction (Law Reform Commission of Hong Kong 1982). The change was effected in 1990 after vigorous advocacy by the local homosexual community and its friends. But the course of reform in Singapore was less favourable.

In 2006, the Law Society of Singapore delivered a report proposing repeal of s377A of the *Singapore Penal Code*. Apparent support for the course of reform was given by the influential voice of the foundation Prime Minister (and 'Minister Mentor') Lee Kuan Yew. However, a fiery debate ensued in the Singapore Parliament where opponents of reform justified the continuance of the colonial provision on the basis that it contributed to 'social cohesiveness'; reflected 'the sentiments of the majority of society'; and that repeal would 'force homosexuality on a conservative population that is not ready for homosexuality' (Aidil 2007). The result was that the reform bill was rejected, although the Prime Minister made it clear that the laws would not generally be enforced, so that gays were welcome to stay in, and come to, Singapore, inferentially so long as they preserved a low profile and observed the requirements of 'don't ask don't tell'.

Occasional glimmers of hope of reform arose in particular countries of the Commonwealth where the same-sex prohibitions were repealed, such as The Bahamas. However, these instances of encouragement had to be counter-balanced against the violence of popular culture in other Caribbean countries (especially Jamaica) in the form of homophobic rap music; the denunciation of 'the homosexual lifestyle' by leaders in African countries such as Robert Mugabe (Zimbabwe), Daniel arap Moi (Kenya), Olusegun Obasanjo (Nigeria) and Yoweri Museveni (Uganda). The successive prosecutions for sodomy in Malaysia of an opposition politician, Anwar Ibrahim, were strongly supported by that country's leader (Dr Mahatir). In Jamaica (2004) and in Uganda (2011), leading advocates of law reform were brutally murdered against a backdrop of verbal calumny in popular culture, politics and sections of the media. On the face of things, the scene in these Commonwealth countries looks grim and forbidding. Only Nelson Mandela, father of South Africa's multi-racial democracy, spoke strongly in Africa against the proposition that homosexuality was 'un-African'. For him, it was 'just another form of sexuality that has been suppressed for years. ... [It] is something we are living with.'<sup>23</sup> Still, the advocacy of change in many such countries is dangerous and risky. The future looks bleak.

23 N. Mandela in Gift Siso Siphos and B. Atieno (2009) *United Against Homosexuality, New African* (quoted in Human Rights Watch 2008, p. 10).

### 3. The future

Against this background, a remarkable development occurred in India on 2 July 2009. The Delhi High Court (constituted by Justices A.P. Shah CJ and S. Muralidhar J) on that day handed down its long awaited decision in *Naz Foundation v Govt. of NCT of Delhi and Others* (2009). The Court unanimously upheld a challenge brought by the Naz Foundation against the validity of the operation of s377 of the IPC, to the extent that the section criminalised consensual sexual conduct between same-sex adults occurring in private. In a stroke, the Court liberated large numbers of the sexual minorities described by the scientists, defended by Wolfenden, freed by legislation elsewhere, but kept in legal chains by the enduring penal code provisions of the British Empire.

Curiously, before the Delhi High Court, the Union Ministry of Health & Family Welfare joined with other health respondents to the proceedings to support the Foundation's challenge. The Union Ministry of Home Affairs, on the other hand, appeared to oppose relief and to assert that s377 of the IPC reflected the moral values of the Indian people. This is not the occasion to recount every detail of the judicial opinion of the Delhi High Court which was immediately flashed around the world, not only because of its potential importance for India beyond Delhi, but also because of its possible significance in the many other Commonwealth countries which retain identical or like provisions of their criminal codes and enjoy identical or like constitutional provisions such as were the source of the relief provided by the Court.

The participating judges traced:

- The history of the IPC, the nature of the challenge and of the specific interest of the Naz Foundation which works in the field of HIV/AIDS intervention and prevention (*Naz Foundation v Govt. of NCT of Delhi and Others* 2009, pp. 847–8, [2]–[10]);
- The response of the respective Union governmental agencies and of other respondents in the case, many of them supporting the Naz Foundation (*ibid.* pp. 850–5, [11]–[23]);
- The invocation of the right to life and the protection of personal dignity, autonomy and privacy under the Indian Constitution (*ibid.* pp. 856–65, [25]–[52]);
- The context of global trends in the protection of the privacy and dignity rights of homosexuals, many of them noted above (*ibid.* pp. 865–8, [53]–[59]);
- The absence of a compelling state interest to intrude into such private and intimate conduct and, on the contrary, the strong contrary conclusion in the context of the AIDS epidemic (*ibid.* pp. 868–80, [60]–[87]);

- The Court's conclusion that s377 violated the constitutional guarantee of equality under art14 of the Constitution of India (ibid. pp. 880–3, [88]–[93]; and
- Impermissibly and disproportionately targets homosexuals as a class (ibid. pp. 883–9, [94–115]).

The Delhi Court concluded that the provisions of s377 were severable in so far as they applied to offences against minors (for which there was no other equivalent law in the same-sex context (ibid. pp. 893–5, [120]–[128]) and the ultimate affirmation that the notion of equality in the Indian Constitution, upheld in the decision, represented an underlying theme which was essential because of the very diversity of the Indian society upon which the Constitution operated (ibid. pp. 895–6, [129]–[131]).

The decision of the Delhi High Court in the *Naz Foundation Case* is presently subject to appeal to the Supreme Court of India. At the time of writing this article, the decision is not known. It may be expected later in 2011. But whatever the outcome, no appellate court could ever re-configure the state of the law or of society to the conditions prevailing in India prior to the delivery of the judgment in *Naz*. The discourse has shifted. Significantly, the Government of India elected not to appeal against the decision of the Delhi Court. It was content to leave the authority of the decision to stand as stated, with the high implication, thereby, that it would be observed in all other parts of the nation. The Supreme Court of India will in due course reveal its conclusion. But the discourse in India (and in the many other countries where the same or similar provisions of the imported criminal codes apply) has changed.

Yet, notwithstanding this hopeful sign, the prospect of change in the other 41 jurisdictions of the Commonwealth of Nations that continue to criminalise same-sex conduct still appears discouraging. Still, here too, several things are happening which may be occasions for cautious optimism, at least in the long term. Most of these developments arise in the context of responses by the global community to the HIV/AIDS epidemic. It is, to some extent, unpalatable to support the important arguments advanced by Bentham and many writers since, for the winding back of the criminal law to its proper realm of operation, on grounds based on the pragmatic concern to respond effectively to the HIV epidemic. At one stage in the reasoning in the *Naz Foundation* case, as the distinguished Indian judges move to their conclusion, they quote from remarks that I had made shortly before to a conference of the Commonwealth Lawyers' Association held in Hong Kong (Kirby 2009). The Delhi High Court must have discovered my remarks on the internet. They noted that my observations had been offered in the context of an analysis (similar to that set out above) concerning the criminal codes 'imposed on colonial people by the Imperial rulers of the British Crown' (*Naz Foundation v Govt. of NCT of Delhi and*



*Others* 2009, p. 879 [85]). As stated in the *Naz Foundation Case*, and accepted by the Delhi High Court, I contended that the criminalisation of private, consensual, adult homosexual acts was wrong:

- Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;
- Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantage people on the ground of their race or sex;
- Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and
- Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS (ibid. pp. 889–95, [116]–[128]).

Of the foregoing errors, only the last is relevant to the HIV epidemic and AIDS. Yet this is now an important line of reasoning upon which hang many international attempts to persuade countries that still adhere to their colonial legacy to think again and to change by legislation or judicial decision, their local equivalents to s377 of the IPC that was the provisions before the Delhi High Court.

This is not the occasion to identify all of the developments that are occurring. However, they include:

- 1) Repeated statements by the secretary general of the United Nations (Mr Ban Ki-moon), urging member states to change their legal prescriptions of this kind without delay. Thus, on 25 January 2011, in remarks to the session of the Human Rights Council in Geneva, the secretary general said:

Two years ago I came here and issued a challenge. I called on this Council to promote human rights without favour, without selectivity, without any undue influence ... We must reject persecution of people because of their sexual orientation or gender identity ... who may be arrested, detained or executed for being lesbian, gay, bisexual or transgender. They may not have popular or political support, but they deserve our support in safeguarding their fundamental human rights.

I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice cannot justify any violation of human rights ... When our fellow human beings are persecuted because of their sexual orientation or gender identity, we must speak out. That is what I am doing here. That is my consistent position. Human rights are human rights everywhere, for everyone. (Ki-moon 2011)

The secretary general has made many similar statements. They are backed up by strong international declarations of commitment in the context of HIV/AIDS (United Nations General Assembly 2011). His words are supported by like statements on the part of the Administrator of the United Nations Development Programme (UNDP), the director general of the World Health Organisation (WHO), the United Nations High Commissioner for Human Rights (UNHCHR), the Executive Director of UNAIDS and other United Nations voices. Rarely has the world organisation spoken with such unanimity and unvarnished clarity.

- 2) Additionally, the United Nations Development Programme (UNDP) has established a Global Commission on HIV and the Law. The chairman of this body is Federico Henrique Cardoso, former president of Brazil. It includes in its numbers several distinguished lawyers of the common law tradition, legislators and other experts. I am myself a member of the Commission. In considering the areas of law reform that are required to strengthen the global response to the ongoing epidemic of HIV/AIDS which each year claims about 2.6 million lives, the Global Commission has identified several fields of law for priority action. These include criminal laws that impede the successful strategies to support prevention of the spread of HIV and to respond effectively to the needs of health and therapy for the infected and those vulnerable to infection. It may be expected that the Global Commission will turn its attention to the ongoing legacy of Imperial criminal codes as they continue to apply in so many countries of the common law world and beyond.
- 3) A third source of action is the Eminent Persons Group (EPG) of the Commonwealth of Nations. This body arose out of the Trinidad & Tobago Affirmation that followed the Commonwealth Heads of Government Meeting (CHOGM) held in Port of Spain, Trinidad in October 2009 (Commonwealth Heads of Government Meeting 2009). I am a member of the EPG. Among the priority areas requiring attention, identified by the EPG, is the response of Commonwealth nations to the HIV/AIDS epidemic. Although Commonwealth countries comprise one third of the world's population, it is estimated that two thirds of those who are currently living with HIV or AIDS are Commonwealth citizens.<sup>24</sup> The EPG has drawn this fact to the notice of the Commonwealth leaders. It will be an important component of the report of the EPG. That body will recommend that those laws that may impede a successful strategy against HIV and AIDS should

24 United Nations Development Programme, *Comparative Table of HIV Infection in the World* (United Nations Development Programme 2010, pp. 197–201).

be considered for reform and prompt action. The alternative is that the nations that have received the unlovely legacy of same-sex criminal prohibitions will continue to watch as their citizens and residents become infected and die in conditions of poverty, stigma and shame.

In the post-Imperial age, there are no gunships that might be sent to enforce the messages of reform voiced in the United Nations, by UNDP or by the Commonwealth EPG. No armed force or coercive military action can be brought to bear. All that is available is the power of ideas and the persuasion that is based on the experience of other countries. But there is also the argument of self-interest because the impact of HIV is not only devastating in personal terms. It is also an enormous burden on the economies of the countries that persist with their current disabling legislation. Where human rights, individual dignity and relief from suffering do not prove persuasive, other means must be deployed including economic arguments and the force of international good opinion.

The Naz Foundation case demonstrates that the power of international law and good example today is a force far more potent than even the coercive orders of the Privy Council were at the heyday of British Imperial power. Words spoken in conferences will sometimes be read and will enter the minds of legislators and judges worldwide. Decisions of final national courts will be published in the *Law Reports of the Commonwealth*, on the internet and in journals that make their way to equivalent courts in other lands. Journals such as this and associations such as ours will bring wisdom and good experience beyond our own lands to colleagues elsewhere who, so far, are walking in darkness.

This is now the global reality of the law. In that global community, we who share the English language have a special, added advantage. We can readily communicate ideas with one another in the English language and through courts, legislatures and other institutions that share many commonalities. The anti-sodomy offences and same-sex criminal prohibitions of the British Empire constitute one target of communication that needs to be enhanced, expedited and accelerated.

This imperative does not exist only to achieve an effective response to the AIDS epidemic. It is also there for the proper limitation of the criminal law to its appropriate ambit; for an end to oppression of vulnerable and often defenceless minorities; for the adoption of a rational attitude to empirical scientific evidence about human nature; and for the removal of a great unkindness and violence by state authorities that has burdened human happiness for too long, precisely as Jeremy Bentham wrote 200 years ago.

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